

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000195-001 DT

07/08/2005

HONORABLE MARK R. SANTANA

CLERK OF THE COURT
K. Wendroff
Deputy

FILED: _____

VIACOM OUTDOOR INC

v.

CHIRO PLUS CHIROPRACTIC CENTER PC
(001)

TOD L STEWART

REMAND DESK-LCA-CCC

RULING

I. JURISDICTION

This court has jurisdiction pursuant to Article VI, Section 14 of the Arizona Constitution.

II. FACTS

On April 22, 2004, Plaintiff Viacom Outdoor Inc. (Viacom) filed a complaint against defendant Chiro Plus Chiropractic Center (Chiro) in the West Phoenix Justice Court for the principal sum of \$2,221.05 plus accrued interest. The debt arose from certain billboard advertising services provided by Viacom to Chiro. On May 11, 2004, Chiro's President, Mathew Harty (Harty), filed a timely, unverified answer to the Complaint.

Viacom then filed a motion for summary judgment. Chiro did not file a response. On June 17, 2004, the motion was granted. Chiro then retained counsel, who filed a notice of appearance on July 1, 2004. Defense counsel filed a motion for relief from judgment under Rule 60 (c) requesting that the trial court vacate its order, a motion to enlarge time to respond pursuant to Rule 56(f) and a motion to reconsider.

In the motions for relief from judgment and to reconsider, Chiro argued that its failure to file a timely response was the result of a calendaring error and that there were factual issues in dispute that precluded summary judgment. The motion to enlarge time requested additional time to conduct discovery. The motions did not include supporting affidavits.

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The trial court denied Chiro's motions. On September 9, 2004 , judgment was entered in Viacom's favor.

On October 4, 2004, Chiro filed a notice of appeal.

III. ANALYSIS

A. Introduction

On appeal, Chiro argues that the trial court erred in granting Viacom's motion for summary judgment. Chiro also contends that the trial court erred in refusing to grant its motions for relief, to reconsider and to enlarge time for discovery.

B. Did the trial court abuse its discretion in granting the motion for summary judgment and denying Chiro's motion for reconsideration?

Where a party fails to respond to a motion, the trial court has the discretion to grant the motion and deny a motion for relief. See Arnold v. Van Ornum, 4 Ariz App. 89, 91, 417 P.2d 723, 725 (Ct. App. 1966). Absent a clear abuse of discretion, an appellate court will not disturb the trial court's decision. Id. at 91, 417 P.2d at 725.

When a plaintiff files a properly supported motion for summary judgment the defendant must present, either by affidavit or other evidence, facts controverting the plaintiff's affidavit. Sato v. Denburgh, 123 Ariz. 225, 228, 599 P.2d 181, 184 (1979). If the defendant fails to do so, the facts alleged by plaintiff should be considered true. Id. At 225, 599 P.2d at 184.

The record indicates that the trial court had uncontroverted competent evidence supporting Viacom's claim. Chiro did not present controverting evidence; Chiro's only filed pleading was its unverified answer. Although Chiro argues otherwise, the record does not contain admissible evidence that creates an issue of fact. The trial court did not abuse its discretion in granting the motion for summary judgment or denying the motion for reconsideration. See Northern Contracting v. Alsis-Chommers Corp., 117 Ariz. 374, 573 P.2d 65 (1977).

C. Did the trial court abuse its discretion in denying Chiro's motion for relief pursuant to A.R.C.P. Rule 60(c)?

Pursuant to A.R.C.P. Rule 60 (c), a party seeking relief from entry of judgment must show that it promptly sought relief from the entry, that the failure to file a timely response was due to either mistake, inadvertence, surprise or excusable neglect and that it had a meritorious defense. Richas v. Superior Court, 133 Ariz. 512, 652 P.2d 1035 (1982). Did Chiro meet this three prong test?

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Chiro did promptly seek relief from the summary judgment order. On the question of mistake, inadvertence or excusable neglect, Chiro's only argument for relief is that it miscalculated the response date. Chiro did not file an affidavit explaining how the response date was miscalculated or what it believed the response date should have been. Excusable neglect is negligent or inadvertent conduct that a reasonably prudent person might have committed under similar circumstances. City of Phoenix v. Geyler, 144 Ariz. 323, 331, 697 P.1d 1073, 1081 (1985). . Not being provided with an explanation as to why the alleged miscalculation occurred, the trial court could conclude that the error resulted from carelessness, not excusable neglect.

Carelessness is not the equivalent of excusable neglect.¹ See Thomas v. Goettl Bros Metal Products, 76 Ariz. 54, 57, 258 P.2d 816, 817 (1953). The determination of whether excusable neglect or carelessness has been demonstrated is left to the discretion of the trial court and will not be disturbed unless there is evidence of a clear abuse of discretion. Id. at 57, 258 P.2d at 817. The trial court did not abuse its discretion in denying the motion for relief.

Moreover, one who seeks relief from a judgment under Rule 60(c) must also demonstrate the presence of a meritorious defense by affidavit or testimony. United Imports and Exports Inc. v. Superior Court, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982). Chiro did not file an affidavit or provide other competent evidence that would establish a meritorious defense. Having failed to demonstrate a meritorious defense, Chiro is not entitled to relief under A.R.C.P. Rule 60(c).

D. Did the trial court abuse its discretion when it denied Chiro's motion to enlarge time pursuant to A.R.C.P. Rule 56(f)?

In order to obtain additional discovery time and postpone a motion for summary judgment, A.R.C.P. Rule 56(f) requires the moving party to file a supporting affidavit which sets forth: (1) the particular evidence beyond the party's control; (2) the location of the evidence; (3) what the party believes the evidence will reveal; (4) the methods to be used to obtain it and (5) an estimate of the amount of time the additional discovery will require. Magellan South Mountain Ltd. Partnership v. Maricopa County, 192 Ariz. 499, 502, 968 P.2d 103, 106 (1988).

Chiro did not comply with Rule 56(f). It did not file the required affidavit in support of its motion. Moreover, Chiro's motion does not provide the information required by Magellan, supra; indeed that motion offers virtually no justification for extending discovery beyond speculating that additional discovery is needed.

The trial court did not abuse its discretion in denying the Rule 56(c) motion.

¹ As a layman, it is possible that Harty did not understand how time is calculated under the Rules of Civil Procedure or the possible impact of not filing a timely response. But such a misunderstanding does not constitute excusable neglect; Harty is held to the same professional standard as an attorney. Copper State Bank v. Saggio, 139 Ariz. 438, 441, 679 P.2d 84, 87 (Ct. App. 1983).

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IV. CONCLUSION

This court concludes that the trial court correctly granted Viacom's motion for summary judgment. The trial court also did not abuse its discretion by denying Chiro's motions for relief pursuant to Rule 60(c), to reconsider and to enlarge time pursuant to Rule 56(f).

V. ATTORNEY'S FEES AND COSTS

Viacom has requested its attorney's fees and costs on appeal. The parties' advertising contract, paragraph 13, requires Chiro to pay Viacom's costs and reasonable attorney's fees incurred in collecting any contractual debt.

Appellate attorney's fees and costs will be awarded by this court.

IT IS ORDERED:

- (1) The judgment of the trial court is affirmed;
- (2) Viacom shall submit an application for attorney's fees and costs by Friday July 29, 2005;
- (3) Chiro will file any response by Friday, August 12, 2005.